

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

ROBERT BRYAN,

Plaintiff,

v.

Case No. 05-CV-72884-DT
HONORABLE DENISE PAGE HOOD

KURT WARNING and
NEYER, TISEO AND HINDO, LIMITED,

Defendants.

ORDER DISMISSING ACTION WITHOUT PREJUDICE

On July 22, 2005, Plaintiff Robert Bryan filed the instant action against Defendants Kurt Warning and Neyer, Tiseo and Hindo, Limited. The matter was initially assigned to the Honorable John Feikens but was subsequently reassigned to the undersigned as a companion case under E.D. Mich. L.R. 83.11. An Order to Show Cause was issued in this case against Plaintiff to show why the case should not be dismissed for failure to prosecute. To date, no Answer nor other papers have been filed in this case.

Plaintiff previously filed a case before the Court relating to the same facts and injuries in the instant case, removed to this Court on December 12, 2002, captioned, *Bryan v. Wayne Disposal, Incorporated, et al.*, Case No. 02-CV-74921-DT. On July 12, 2005, Plaintiff filed an emergency Motion for Leave to File Third Amended Complaint against Defendants Kurt Warning and Neyer, Tiseo and Hindo, Limited in case number 02-CV-74921-DT, claiming the statute of limitations would run by July 29, 2005. On July 28, 2005, the Court entered an Order granting Plaintiff's motion to amend the Complaint to add Defendants Kurt Warning and Neyer, Tiseo and Hindo,

Limited. The Third Amended Complaint naming these two newly-added Defendants was filed by Plaintiff on July 28, 2005. The newly-added Defendants filed their Answer on August 30, 2005. Prior to the entry of the July 28, 2005 Order in case number 02-CV-74921-DT, Plaintiff apparently filed the instant Complaint against Defendants Kurt Warning and Neyer, Tiseo and Hindo, Limited on July 22, 2005. No Answer or any other papers have been filed in this case number, 05-CV-72884-DT.

Plaintiff filed a response to the Order to Show Cause on December 15, 2005 admitting that there should not be two lawsuits pending in the same court regarding the same facts and injuries. (Resp., p. 2) However, Plaintiff claims that a dismissal with prejudice in this case would result, presumably, in the disposition of the matter on the merits regarding the claims filed in the lower case number, 02-CV-74921-DT.

Because the claims against Defendants Kurt Warning and Neyer, Tiseo and Hindo, Limited are the same in both case numbers and no further action has been taken by Plaintiff in case number 05-CV-72884-DT, the Court dismisses that case number without prejudice. Any statute of limitations argument by Plaintiff remains given that the Court's docket indicates a Complaint was filed on July 22, 2005 in case number 05-CV-72884-DT and an Amended Complaint on July 28, 2005 in case number 02-CV-74921.¹

Accordingly,

¹ On its face, the instant Complaint alleging a state law claim of negligence does not support diversity jurisdiction pursuant to 28 U.S.C. § 1332, given that Defendant Neyer, Tiseo and Hindo, Limited is a Michigan resident. (Complaint, ¶ 2) The Court's jurisdiction over 02-CV-74921-DT is not a matter raised in the Court's Order to Show Cause issued in this case number 05-CV-72884-DT.

IT IS ORDERED that this case is DISMISSED without prejudice for lack of prosecution and as a duplicate to the claims filed in Case No. 02-CV-74921-DT.

/s/ DENISE PAGE HOOD
DENISE PAGE HOOD
United States District Judge

DATED: January 31, 2006

I hereby certify that a copy of the foregoing document was served upon counsel of record on January 31, 2006, by electronic and/or ordinary mail.

s/William F. Lewis
Case Manager